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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JENNIFER STULL,

Defendant and Appellant.

G042121

(Super. Ct. No. FVA027150)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Ingrid Adamson Uhler, Judge. Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck
and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jennifer Stull was charged with first degree murder in the shooting death of her ex-boyfriend Michael Ribaud. At trial, she claimed she shot Ribaud in self-defense, but the jury convicted her of murder in the second degree. She now contends her trial was unfair because the court allowed evidence showing her character for violence while excluding other evidence that was in her favor. Finding no basis to disturb the judgment, we affirm.

FACTS

On the evening of June 24, 2006, Ribaud was found dead in his home with gunshot wounds to his head and chest. At trial, Stull admitted she was the killer and testified at length regarding her relationship with Ribaud.

She said she moved in with him in the spring of 2005. At the time, she was 21 years old, on probation for auto theft, and addicted to methamphetamine. Ribaud was also a heavy methamphetamine user. He was very domineering in their relationship and often resorted to physical violence if Stull did not do what he wanted. Most of the violence was in the form of hitting and slapping, but sometimes he would brandish a knife in front of her. He also tried to run her over with his car on one occasion. Although he threatened to kill her if she ever left him, she moved out of his house after a couple of months. However, she continued to see him off and on until she was sent to prison for a probation violation in the fall of 2005.

When released from prison in February 2006, she had no intention of getting back together with Ribaud. He had a new girlfriend by then, and she was involved with a drug addict named Jarrod Davis, whose trailer home she eventually shared. However, she still looked to Ribaud for help from time to time. He gave her food, rides and money, and she gave him sex in return. She didn't like the arrangement, but felt she had no one else to look to for help. She and Ribaud were both using a lot of drugs during this period.

On the night of June 24, 2006, she called Ribaudó and asked him if she could borrow some money and cigarettes. He told her she would have to “fuck him” first, but this time, she said no. When Ribaudó said he would help her out anyway, she had Davis drive her over to his house. At the time, she was wearing tight jeans and a low-cut shirt. She also brought along a gun “in case something happened.” However, she did not tell Davis she had the weapon.¹

When they arrived at Ribaudó’s house, she had Davis park his car in front of a neighbor’s house and wait for her there. She then went up to the door, and Ribaudó met her by putting his arm around her and giving her a kiss. They walked into Ribaudó’s office, where he had a pornographic movie playing on his computer. The movie made Stull think Ribaudó had sexual intentions because, when they were living together, he would often put on a pornographic movie when he wanted to have sex with her.

Stull told him nothing sexual was going to happen because Davis was outside in his car. This angered Ribaudó, and he started getting rude and verbally abusive. Frightened by his change in demeanor, Stull pulled out the gun. She thought the sight of the weapon would get him to settle down, but it just made him angrier. As he continued to berate her, he sat down in a chair and turned toward a drawer in his desk. Having seen knives in that drawer when she lived with Ribaudó, Stull became fearful for her life. Her fear increased when he reached for the drawer, and before she knew it, she closed her eyes and shot him in the back of the head.

The shot wasn’t fatal. When Stull ran out of the room, he followed her and asked her, “What did you do?” His voice was calm, but his eyes were full of rage. She said she was sorry and offered to call for help, but he told her to just get out of his house. At that point, she made a dash for the door. Ribaudó tackled her in the hallway and began punching her, pulling her hair and twisting her head. Thinking he was going to

¹ The gun belonged to Davis’ mother, who lived with Davis and Stull. She kept the weapon in a lockbox under her bed.

break her neck, she pulled the gun from her pocket and shot him in the heart. Ribaudó slumped to the floor, and she got away. Although he was still breathing when she left the house, he was dead by the time his girlfriend found him later that evening.

After the shooting, Stull ran outside to Davis' car, but she didn't tell him what she had done. All she said was that Ribaudó had tried to hurt her. Davis noticed she was winded and had a red mark under her right eye. Her hair was also disheveled and her jacket was torn. When they got home to Davis' trailer, she put the gun back where she got it and went to bed.

Two days later, the police came to Davis' trailer. Stull tried to hide from them, but they found her and placed her under arrest. She showed them where the gun was, and when they searched Davis' car, she helped them find a pair of gloves that were located in the back seat. One of the gloves contained gunshot residue. Stull claimed she did not wear the gloves on the night of the shooting, but Davis testified he saw her wearing them when she returned to his car after visiting Ribaudó.

When the police interviewed Stull about the shooting, she initially denied any involvement in Ribaudó's death. However, she eventually admitted shooting him. As she did at trial, she said she shot Ribaudó in his office because she thought he was going to get a knife, and she shot him in the doorway because she thought he was going to break her neck. The jury didn't buy her claim of self-defense, however, and instead convicted her of murder in the second degree.

I

At trial, Stull was not the only witness to testify about Ribaudó's character for violence. Several other witnesses testified Ribaudó was abusive to her during their relationship, and the prosecution stipulated Ribaudó was convicted of abusing another woman in 1996. In light of all the evidence that was presented about Ribaudó's character for violence, the court allowed the prosecution to introduce evidence that Stull also had a violent character. Stull contends this evidence violated her constitutional right to a fair

trial, and her attorney was ineffective for failing to challenge it. However, we find the evidence was properly admitted.

The prosecution's evidence as to Stull's character for violence came from three witnesses. Davis testified that when he lived with Stull, she was "somewhat controlling" and "freakishly strong for a woman." He also said she sometimes got physically aggressive when they argued.

Sheriff's Deputy Roxanne Terez-Bessinger testified that while she was working in the San Bernardino jail in 1994, Stull threatened to kill her when she tried to move her into protective custody. Stull testified she only told Terez-Bessinger she was going to "kick her ass," and that was because she felt she would be in danger if she were put in protective custody. She also testified she apologized to Terez-Bessinger afterwards. Nonetheless, the incident was reported to authorities and she ended up pleading guilty to making a criminal threat.

Psychologist Marjorie Graham-Howard was appointed to interview Stull before trial. She testified that Stull told her she had been abused by several of her boyfriends. Stull also told her she could only take so much of their abuse before she would "flip out" or "snap." Explaining what she meant by this, Stull testified she would sometimes lash out verbally at her boyfriends when they tried to abuse her. However, she denied she was ever physically abusive to them.

The trial court instructed the jurors that the evidence of Stull's violent character was not sufficient by itself to prove she was guilty. However, they could use it along with the other evidence to find she was disposed to violence and thus guilty of murdering Ribaud. (CALCRIM No. 852.) Stull contends the court erred in allowing the jury to use the evidence for this purpose, but we disagree.

"As [Stull] correctly notes, character evidence is generally inadmissible to prove a person acted in conformity with it on a given occasion. (Evid. Code, § 1101, subd. (a).) [However,] Evidence Code section 1103 sets forth exceptions to this general

rule. One exception allows a criminal defendant to offer evidence of the victim's character to show the victim acted in conformity with it. (Evid. Code, § 1103, subd. (a)(1).) If the defendant offers evidence showing the victim has a violent character, then the prosecution may offer evidence of the *defendant's* violent character to show the defendant acted in conformity with it. (Evid. Code, § 1103, subd. (b).)" (*People v. Myers* (2007) 148 Cal.App.4th 546, 552.)

Stull claims she never opened the door in this regard, because she did not offer evidence showing Ribaudó had a violent character. Although she presented a plethora of evidence that Ribaudó was threatening and abusive during their relationship, she claims that evidence did not go to Ribaudó's propensity for violence, but to her own state of mind and whether her belief in the need for self-defense was reasonable. The distinction is untenable because Stull's claim that she needed to defend herself was based on the assumption Ribaudó was going to kill her, and she relied on Ribaudó's prior abusive conduct to prove this assumption was true. The simple fact is she used it for both purposes.

In closing argument, her attorney repeatedly referred to Ribaudó's past conduct to prove he was prone to violence and thus likely to kill her on the night in question. Defense counsel surmised, "There was going to be some kind of aggression on his part, some kind of threat *because there always was.*" (Italics added.) More specifically, counsel argued Stull's refusal to have sex with Ribaudó is what set him off. Counsel theorized that after that, Ribaudó "got mad . . . *just like he always did.*" (Italics added.) Summarizing her point, counsel said, "*Based on the prior relationship, the abuse, the threats,* [Stull] thought he was going to kill her right then." (Italics added.)

These statements prove the defense used the evidence of Ribaudó's prior violent conduct not only to establish Stull's state of mind, but also to show Ribaudó was prone to violence and acted in accordance with that propensity on the night in question.

In other words, the evidence was used as classic character evidence within the meaning of Evidence Code section 1103, subdivision (b).

Stull also contends the court should have excluded the evidence of her character for violence under Evidence Code section 352. Under that section, the trial court may exclude evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) The trial court has broad discretion under this section, and its decision to admit or exclude certain evidence will not be disturbed unless it is arbitrary, capricious or patently absurd. (*People v. Sanders* (1995) 11 Cal.4th 475, 512.)

The court’s decision to allow evidence of Stull’s character for violence was none of these things. As it turned out, the court actually allowed the defense to introduce much more character evidence about Ribaudó than the prosecution did about her. Compared to the dirt that was heaped upon Ribaudó, the quantity and nature of the evidence Stull had to put up with was relatively mild. And the character evidence that was adduced about her was arguably consistent with her claim of self-defense. It showed that while she could be violent at times, it was usually in the context of a mutual disagreement or some sort of provocation. Therefore, the court did not abuse its discretion in failing to exclude it under Evidence Code section 352.

Although the evidence was properly admitted under state law, Stull asserts its admission violated her federal due process rights. She contends the use of character evidence to prove her propensity for violence offends notions of fundamental fairness. We find no constitutional infringement. After all, she is the one who opened the door to the challenged evidence. When, as here, “‘the defendant places the victim’s reputation as a violent and turbulent man before the jury, [she] also places [her] own.’ [Citations.]” (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1174.)

In *Blanco*, the court rejected the argument this evidentiary rule is unconstitutional. It explained, the defendant “has a choice as to presenting evidence of the victim’s character, which is similar to many tactical choices at trial — such as deciding whether to testify, or whether to present direct evidence of his own good character. The defense choice of strategy often makes admissible in rebuttal certain evidence which would not be admissible in the prosecution’s case-in-chief. There is no due process violation in allowing the defense to govern the admission of such evidence in rebuttal.” (*People v. Blanco, supra*, 10 Cal.App.4th at p. 1176.) We agree with this reasoning and thus find no due process violation under the circumstances presented.

That brings us to Stull’s final argument on this issue. She contends her attorney was ineffective for failing to object to the character evidence that was admitted against her. But as defense counsel recognized, that evidence was going to come in if she wanted to introduce evidence of Ribaudó’s character for violence. That’s just the way the Evidence Code works. Was that a reasonable trade off? The best way to answer that question is to consider how the case would have looked to the jury without the evidence of Ribaudó’s violent character.

The record shows that after essentially inviting herself over to Ribaudó’s house, Stull had Davis drive her there. At the time, she was wearing provocative clothing and had gloves and a gun in her possession. Once inside Ribaudó’s home, she shot him first in the back of the head and then in the heart. She then hid from the police for two days and denied any involvement in the shooting when they initially questioned her about it. Although she eventually claimed she shot Ribaudó in self-defense, the prosecution theorized she was motivated by jealousy over Ribaudó’s new girlfriend and charged her with murder one.

Given these circumstances, it was extremely important for the jury to know about Ribaudó’s violent character, because his propensity for violence was the linchpin of Stull’s self-defense claim. Even though the introduction of this evidence resulted in

some negative evidence being admitted against Stull, her defense was a suicide mission without it.

We cannot say defense counsel was ineffective in her handling of the issue. In fact, defense counsel's decision to attack Ribaudó's character may have been what saved Stull from being convicted of murder in the first degree. The fact the jury opted for the lesser offense of second degree murder supports our conclusion that Stull was afforded effective assistance of counsel. No Sixth Amendment violation has been shown.

II

Stull also contends the exclusion of certain evidence infringed her constitutional right to present a defense. Particularly, she claims the court erred in barring evidence that, at the time of his death, Ribaudó was wearing women's underwear and a penis ring and also had methamphetamine in his system. We find no constitutional violation in the exclusion of this evidence.

“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, [citation], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, [citations], the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) However, a defendant's right to present evidence in her favor is not unlimited. The right only applies to “relevant and material” evidence. (*Washington v. Texas* (1967) 388 U.S. 14, 23.) Evidence lacking significant probative value may properly be excluded without offending the constitution. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.)

Stull contends the fact Ribaudó was wearing women's underwear and a penis ring was relevant to show he was acting aggressively toward her before the shooting. But Ribaudó's donning of these items does not suggest he had violent intentions. In fact, there was no evidence he ever inflicted harm on Stull during their sexual relations. At most, the evidence suggested Ribaudó was interested in having sex

with Stull on the night in question, but Stull testified to that very point. She said Ribaudó not only expected sex from her whenever he did her a favor, he specifically demanded it from her on the night in question. Her testimony on this issue was corroborated by the fact there was a pornographic movie playing in Ribaudó's office at the time his body was discovered. Stull took this as a sign of Ribaudó's carnal intentions, because he typically put on a pornographic movie when he wanted to have sex with her. That being the case, the evidence about the underwear and ring was cumulative and relatively unimportant to Stull's defense.

The same is true about the evidence that Ribaudó had methamphetamine in his system at the time of his death.² There was, after all, plenty of evidence Ribaudó was a heavy drug user. Stull even told the police she thought Ribaudó was getting high when she talked to him on the phone on the night in question. So, the jury had a basis to infer he was under the influence at the time of the shooting. Ironically, however, Stull testified Ribaudó was actually more easy-going when he was using drugs than when he was sober. Therefore, it is questionable whether additional evidence on the subject would have benefited Stull. We cannot say the exclusion of the subject drug evidence violated her right to present a defense. No constitutional infringement has been shown.

III

As discussed above in section I, the court allowed the prosecution to introduce some of the statements Stull made to psychologist Marjorie Graham-Howard before trial. Stull contends this violated her attorney-client, psychologist-patient, and attorney work product privileges, but we do not find that to be the case.

When this issue came up at trial, defense counsel confirmed to the court that she had given Graham-Howard's report to the prosecutor with Stull's consent in

² The Attorney General claims the court never precluded Stull from introducing this evidence. But when defense counsel asked the forensic pathologist if he found methamphetamine in Ribaudó's blood, the court sustained the prosecutor's objection to the question.

order to facilitate a possible plea bargain. The court ruled that by so doing, the defense had waived any privileges applicable to the report, and therefore, the prosecutor could impeach Stull with the statements she made to Graham-Howard. That ruling was correct. Having voluntarily turned over the report to the prosecutor, the defense waived its right to assert the materials contained therein were privileged. (Evid. Code, § 912; *People v. Combs* (2004) 34 Cal.4th 821, 862; *Woods v. Superior Court* (1994) 25 Cal.App.4th 178, 187.)

Stull's fallback position to this is that her attorney was ineffective for disclosing the report to the prosecution in the first place. However, the record shows the disclosure was made with Stull's consent. Therefore, she cannot blame her attorney for any harmful consequences that ensued. (See *People v. Contreras* (2009) 177 Cal.App.4th 1296, 1306-1307 [rejecting the defendant's ineffective assistance of counsel claim where defendant consented to counsel's complained of strategy].)

Still, Stull insists, "At a minimum, defense counsel should have redacted [the report] to include the material she believed was favorable to [her] and relevant to reaching a favorable plea bargain . . . and to exclude those parts of the [report] that supported the prosecution's case" But if defense counsel had done that, the prosecutor would not have had all of the information she needed to determine whether a pretrial disposition of the case was appropriate. And, it would have made it look like the defense was hiding the ball, which likely would have lessened the chances for a plea bargain. All things considered, we do not believe counsel's failure to redact the report constituted ineffective assistance of counsel.

IV

Lastly, Stull contends the court erred in failing to order the disclosure of confidential information pertaining to one of the police officers involved in the case. She contends disclosure was required under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), but we disagree.

Under *Brady*, the prosecution is required to disclose evidence that is material to the defendant's guilt or punishment. (*Brady, supra*, 373 U.S. at p. 87.) Evidence is material if there is a reasonable probability its disclosure would affect the outcome of the proceedings. (*People v. Hoyos* (2007) 41 Cal.4th 872, 917-918.) In this case, the court reviewed the subject information in camera and determined it was not discoverable under this standard. Having reviewed the information ourselves, we agree with this assessment. There is no reason to disturb the trial court's ruling on this issue.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.